U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 32607385

Date: AUG. 06, 2024

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Exceptional Ability)

The Petitioner, a pastry chef, seeks classification as an individual of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the Petitioner met the initial evidence requirements for the classification by submitting evidence of a one-time achievement or meeting at least three of the evidentiary criteria at 8 C.F.R. § 204.5(h)(3). The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

To establish eligibility as an individual of extraordinary ability, a petitioner (or anyone on the petitioner's behalf) must establish that they:

- Have extraordinary ability in the sciences, arts, education, business, or athletics;
- Seek to enter the United States to continue work in their area of extraordinary ability; and that
- Their entry into the United States will prospectively substantially benefit the United States.

Extraordinary ability must be demonstrated by evidence of sustained national or international acclaim as well as extensive documentation that their achievements have been recognized in the field. Section 203(b)(1) of the Act.

The implementing regulation further states that the term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." It also sets forth a multi-part analysis. A petitioner can demonstrate international recognition of their achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If such evidence is unavailable, then they must alternatively provide evidence that meets at least three of the ten listed criteria, which call for evidence about other awards they may have received, published material about them in qualifying media, and their authorship of scholarly articles, among other types of evidence. 8 C.F.R. §§ 204.5(h)(2),(3).

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination, assessing whether the record shows that the individual possesses the acclaim and recognition required for this highly exclusive immigrant visa classification. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011).

II. ANALYSIS

The Petitioner is a pastry chef who intends to continue working as such in the United States.

A. Evidentiary Criteria

Because the Petitioner has not indicated or established that they received a major, internationally recognized award, they must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). The Director found that the Petitioner met only the evidentiary criterion at 8 C.F.R. § 204.5(h)(3)(iv), relating to judging. On appeal, the Petitioner asserts that they met six other evidentiary criteria.[1] After reviewing the evidence in the record, we conclude that the Petitioner does not meet at least three of the evidentiary criteria, and therefore does not meet the initial evidence requirements for this classification. While we may not discuss every document submitted, we have reviewed and considered each one.

> *Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.* 8 C.F.R. § 204.5(h)(3)(v)

To satisfy the regulation at 8 C.F.R. § 204.5(h)(3)(v), a petitioner must establish that they not only made original contributions, but that those contributions have been of major significance in the field. For example, a Petitioner may show that the contributions have been widely implemented throughout the field, have remarkably impacted or influenced the field, or have otherwise risen to a level of major significance. *See Visinscaia*, 4 F. Supp. 3d at 134-35.

[1] Throughout this proceeding, the Petitioner did not assert, nor does the record show that he met the criteria at 8 C.F.R. § 204.5(h)(3)(ii), (vii), or (x), relating to membership, artistic display, or commercial success. We consider these issues to be waived. *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009).

As a preliminary matter, the Petitioner contends on appeal that the Director acted "in violation of the due process of law" in finding him ineligible for this and other criteria at 8 C.F.R. § 204.5(h)(3). But he does not identify the due process rights that are implicated in the adjudication of the Petitioner's extraordinary ability immigrant petition. *See Lyng v. Payne*, 476 U.S. 926, 942 (1986) (stating that "[w]e have never held that applicants for benefits…have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment."); *see also Azizi v. Thornburgh*, 908 F.2d 1130, 1134 (2d Cir. 1990) (explaining that the Fifth Amendment protects against the deprivation without due process of property rights granted to noncitizens; however, petitioners do not have an inherent property right in an immigrant visa).

We acknowledge the Petitioner has incorporated several pages of narrative into the appeal brief from his response to the Director's request for evidence (RFE) that discuss his work accomplishments. He generally asserts that the Director erred in determining that the evidence was insufficient to meet this criterion. However, based on our de novo review of the evidence and for the following reasons, we agree with the Director that the record is insufficient to establish that the Petitioner meets this criterion.

The Director denied the petition in part, acknowledging that the Petitioner submitted several letters from employers and colleagues that generally praised his work, but concluded the letters were insufficient to show that he meets this criterion. On appeal, the Petitioner contends the Director did not adequately consider this evidence, asserting:

> Recognized experts in the confectionary and chocolate-making industry, both nationally and internationally, have acknowledged the significance of [the Petitioner's] methodology and pastry paste. His innovative contributions have not only expanded the possibilities within the field but have also elevated the artistry and quality of confectionery and chocolate creations, making him a trailblazer in this specialized domain.

The Director explained in his decision that the letters fell short in substantiating the Petitioner's assertion that he had made contributions of major significance to the confectionery field. For instance, he took note that the letters authored by individuals employed by [redacted] did not include the authors' contact information and thus did not meet the requirements for such letters at 8 C.F.R. § 204.5(g)(1). He also observed that the authors used identical language to vaguely describe the Petitioner's accomplishments and did not mention the Petitioner by name. Identical language in letters "suggests that the letters were all prepared by the same person and calls into question the persuasive value of the letters' content." *Hamal v. U.S. Dep't of Homeland Security*, No. 19-2534, slip op. at 8, n.3 (D.D.C. June 8, 2021). We agree with the Director that these letters which simply offer identical generalized statements are of little probative value to the matter here. *Matter of Chaw*athe, 25 I&N Dec. at 376.

Other letters from the Petitioner's former employers offer insufficient support to the Petitioner's claims that he has made major significant contributions to the field. The authors discuss the ways in which he benefited their business operations, note that he has talent, and generally assert that he is a reliable, respectful employee. For instance, in the letter from a former employer, [redacted] (F-), the owner indicates that the Petitioner was hired in 2009 as a baker-confectioner and was promoted in 2010 to "sous-chef of the confectionery shop," where he "effectively led three

subordinates." F- states that the Petitioner "competently developed and introduced new desserts, bread, and custom cakes into the restaurant menu," and "was never late for work, always kept confidentiality, did not conflict with other employees, and showed respect to others." But F- did not discuss any major significant contributions that the Petitioner has already made to the field. *See Amin v. Mayorkas*, 24 F.4th 383, 393-394 (5th Cir. 2022) (finding that contributions which were not adopted beyond a petitioner's employer do not meet this criterion). As explained by the Director, the letter authors describe the Petitioner's work in a positive light, but do not suggest that his work has remarkably impacted or influenced the confectionery field. In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Matter of Chaw*athe, *supra*. This criterion has not been met.

> *Evidence that the individual has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.* 8 C.F.R. § 204.5(h)(3)(viii)

For the purposes of this criterion, a leading role should be apparent by its position in the overall organizational hierarchy and through the role's matching duties. A critical role should be apparent from the Petitioner's impact on the organization or the establishment's activities. The Petitioner's performance in this role should establish whether the role was critical for the organization or establishment. Additionally, the organizations or establishments must be marked by eminence, distinction, excellence, or a similar reputation.

The Petitioner asserts that he held a leading or critical role in a company that he owned abroad, M-, as its "founder and CEO." The Director requested documentary evidence to establish the leading and critical nature of the Petitioner's work with M-, along with probative evidence to show that M- enjoys a distinguished reputation. The Director determined that the Petitioner was ineligible for this criterion, because though the Petitioner asserted that M- "is one of the most preeminent and successful organizations in confectionery craftsmanship in Russia," the record lacked documentary evidence to substantiate the Petitioner's assertions. The Director determined, in part, that the Petitioner did not meet this criterion because he did not provide documentary evidence about M- in the RFE response to show that M- has a distinguished reputation. "Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the [petition]." 8 C.F.R. § 103.2(b)(14).

In the RFE response, the Petitioner provided a letter from L-, CTO of M-, who indicated that he held general manager and pastry chef positions while employed there. The Director took note of the inconsistencies between the Petitioner's claims that he was founder and CEO of M-, and the information provided by L- in her letter submitted in the RFE response. He advised the Petitioner that he must resolve this inconsistency and ambiguity in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On appeal the Petitioner does not address the Director's concerns regarding the inconsistencies in the record regarding his roles and responsibilities while employed abroad with M-. Rather, on appeal the Petitioner incorporates narrative discussing verbatim his accomplishments in the field from his response to the Director's RFE, and generally asserts that the Director erred in determining the evidence was insufficient to meet this criterion. The Petitioner has not supported his appeal by specifically identifying a law or policy that the Director may have incorrectly applied in determining that the Petitioner is ineligible for this criterion. This criterion is not met.

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field. 8 C.F.R. § 204.5(h)(3)(ix)

To satisfy this criterion, the Petitioner must demonstrate that he commanded a high salary or other significantly high remuneration for services in relation to others in his field. *See Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994) (considering professional golfer's earnings versus other PGA Tour golfers); *see also Grimson v. INS*, 934 F. Supp. 965, 968 (N.D. Ill. 1996) (considering NHL enforcer's salary versus other NHL enforcers); *Muni v. INS*, 891 F. Supp. 440, 444-45 (N. D. Ill. 1995) (comparing salary of NHL defensive player to salary of other NHL defensemen).

The Petitioner submitted a certificate of income and taxation data to demonstrate his income in 2018, as well as some contractual documentation as evidence of the services that M- provided and several payments to M- for services rendered. He submitted information about the average salary for a pastry chef in the city where he was employed abroad, asserting that his compensation in that year was high. The Director determined that a comparison of the Petitioner's financial documentation with average salary statistics for pastry chefs working in that locale was insufficient to show that he has commanded a high salary or significantly high remuneration in relation to others in his field, noting that the Petitioner had not provided sufficient comparative information about the range of compensation earned by others in his field.

On appeal the Petitioner does not address the Director's concerns regarding the lack of sufficient comparative salary data in the record. Instead, he offers the verbatim narrative that he included in his RFE response, which the Director considered in denying the petition. While the Petitioner generally asserts that the Director erred in concluding that he had not met the plain language of this criterion, he does not specifically identify a law or policy that the Director may have incorrectly applied in determining that the Petitioner is ineligible for this criterion. We agree that this criterion has not been met.

Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media. 8 C.F.R. § 204.5(h)(3)(vi).

This criterion contains multiple evidentiary elements the Petitioner must satisfy through the submission of evidence. The first element is that the Petitioner is an author of scholarly articles in the field in which he intends to engage once admitted to the United States as a lawful permanent resident. We consider these articles to fall within two distinct areas.

One relative area is within the academic arena in which a scholarly article reports on original research, experimentation, or philosophical discourse. It is written by a researcher or expert in the field who is often affiliated with a college, university, or research institution. In general, it should have footnotes, endnotes, or a bibliography, and may include graphs, charts, videos, or pictures as illustrations of the concepts expressed in the article. The next area lies outside of the academic arena in which a scholarly article should be written for learned persons in that field. "Learned" is defined as "having or demonstrating profound knowledge or scholarship." Learned persons include all persons having profound knowledge of a field. *See generally* 6 *USCIS Policy Manual* B.1, https://www.uscis.gov/policymanual.

The second evidentiary element this criterion requires is that the scholarly articles appear in one of the following: (1) a professional publication, (2) a major trade publication, or (3) in a form of major media. Relevant factors a petitioner should demonstrate include the intended audience (for professional and major trade publications) and the relative circulation, readership, or viewership are high relative to similar publications (for major trade publications and other major media). *See generally* 6 *USCIS Policy Manual*, *supra*, at B.1. The Petitioner must submit evidence satisfying each of these elements to meet the plain language requirements of this criterion.

The Petitioner does not assert nor does the record establish that he has published an academic scholarly article which reports on original research, experimentation, or philosophical discourse. The Petitioner initially submitted published material (that mostly constituted the Petitioner's recipes for baked goods), which did not adequately illustrate that they were scholarly articles, or that they were published in professional or major trade publications or other major media.

In response to the Director's RFE, the Petitioner pointed to his "BBQ Cake Tutorial" which was published in C- magazine, a periodical which focuses on confectionery creations in 2019. The tutorial provided step-by-step instructions to make and decorate a barbeque-themed cake. The Petitioner also provided pages from C-'s website which indicate that it publishes a monthly printed magazine and offers digital subscriptions to its content. The Director determined that this tutorial did not meet the plain language of this criterion as a scholarly article for learned persons in the field.

On appeal, the Petitioner asserts:

> USCIS' requirement for documentation to establish publication in professional or major trade publications or other major media is excessively rigid. [C-] magazine, where [the Petitioner's] work was featured, is a widely recognized publication in the confectionery industry meeting the criteria for a major media platform.

We have reviewed the information provided about C- in the RFE response. While this material suggests that C- enjoys an international readership, the Petitioner has not provided comparative circulation information about C-'s publications, either on-line or in print, that would show that this magazine meets that plain language of this criterion regarding its standing as a media outlet. Additionally, the Petitioner has not substantiated that C-'s published materials are written for learned persons associated with the confectionery industry or for readership by confectionary enthusiasts in the general populace. We agree with the Director that this criterion has not been met.

B. Final Merits Determination

The Petitioner has not established that he meets at least three of the evidentiary criteria, and thus does not meet the initial evidentiary requirement for classification as an individual of extraordinary ability. Although he claims eligibility for two additional criteria on appeal, relating to awards at 8 C.F.R. § 204.5(h)(3)(i) and published material about the Petitioner at 8 C.F.R. § 204.5(h)(3)(iii), we need not reach these additional grounds. As the Petitioner cannot fulfill the initial evidentiary requirement of

three criteria under 8 C.F.R. § 204.5(h)(3), we reserve these issues.[2] Accordingly, we need not provide the type of final merits determination referenced in *Kazarian,* 596 F.3d at 1119-20. Nevertheless, we advise that we have reviewed the record in the aggregate, concluding that it does not support a finding that the Petitioner has established the acclaim and recognition required for the classification sought.

The Petitioner seeks a highly restrictive visa classification, intended for individuals already at the top of their respective fields, rather than for those progressing toward the top. USCIS has long held that even athletes performing at the major league level do not automatically meet the "extraordinary ability" standard. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994). Here, the Petitioner has not shown that the significance of their work is indicative of the required sustained national or international acclaim or that it is consistent with a "career of acclaimed work in the field" as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990); *see also* section 203(b)(1)(A) of the Act. Moreover, the record does not otherwise demonstrate that the Petitioner has garnered national or international acclaim in the field, and that they are one of the small percentage who have risen to the very top of the field of endeavor. *See* section 203(b)(1)(A) of the Act and 8 C.F.R. § 204.5(h)(2).

ORDER: The appeal is dismissed.

[2] *See INS v. Bagamasbad,* 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions unnecessary to the results they reach).